IPCO Hospital Supply Corporation, Cheshire Labs Division *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC. Case 22-CA-9470

April 9, 1981

DECISION AND ORDER

On August 12, 1980, Administrative Law Judge Herbert Silberman issued the attached Decision in this proceeding. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs, each filed an answering brief to the other's exceptions, and the Respondent filed a motion to reopen the record.

The Board has considered the record and the attached Decision in light of the exceptions, the briefs, and the motion to reopen the record, and had decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as clarified herein, and to adopt his recommended Order.[1]

The General Counsel excepts to the Administrative Law Judge's failure to find that the Respondent violated Section 8(a)(3) of the Act by refusing to offer immediate reinstatement to a number of strikers when the Union, or their behalf, offered unconditionally to return to work. At the hearing, the General Counsel argued that the strikers were entitled to immediate reinstatement because they were unfair labor practice strikers. The Administrative Law Judge found, however, that they were economic strikers. Counsel for the General Counsel has not excepted to the Administrative Law Judge's failure to find that they were unfair labor practice strikers, but nevertheless faults the Administrative Law Judge for not finding that, even as economic strikers, they had a right to immediate reinstatement absent proof that jobs were unavailable for them when they offered to return to work.

While the General Counsel's statement of the law is correct,[2] and although we do not adopt any statement in the Administrative Law Judge's Decision to the contrary, that principle is inapplicable here. This case was heard with the understanding that there were at least some strike replacements, and the Respondent never was led to believe that the number of positions available at the time the strikers offered to return to work or afteward was an issue to be met. The Respondent has submitted to the Board an affidavit of Senior Staff Attorney Michael S. Harris, which on the basis of his review of the Respondent's records, purports to show that each striking employee who had not resigned or returned to work before the Union's offer to end the strike, and who was not disqualified from reinstatement because of misconduct, was offered reinstatement as soon as a position became available. The Respondent moves to reopen the record to permit the introduction of the Harris affidavit and in its motion invities the General Counsel to respond to the evidence contained in the affidavit. The General Counsel neither has opposed the motion to reopen nor responded to the Respondent's invitation to contest the averments therein. Accordingly, we shall grant the motion, and admit into evidence the affidavit, which, we find, establishes that no positions were available for the 35 economic strikers who offered to return to work until September 6, 1979, when the Respondent offered them reinstatement. It also establishes, the absence of objection to the authenticity of its source or controverting evidence, that eight other employees either never struck, returned to work during the strike, or resigned during the strike.[3] In our view, the situation warrants the unusual steps reopening the record and finding summarily in accordance with the evidence offered because, in the circumstances set forth above, such a procedure does not prejudice the General Counsel, while any other course would leave room for argument that one or the other of the parties was prejudiced by the record's lack of clarity as to the status of this issue. Accordingly, we hereby grant the Respondent's motion to reopen the record, and, on the basis of the reopened record, we find no merit in the General Counsel's exception with respect to the right of 35 economic strikers to immediate reinstatement or with respect to the status of the other 8 employees.

The General Counsel also excepts to the Administrative Law Judge's rejection of the allegation that the Respondent violated Section 8(a)(3) of the Act by refusing to reinstate five employees who, before the strike began, refused to leave the Respondent's cafeteria when ordered to do so. We agree with the Administrative Law Judge that the General Counsel has not proved that the employees were engaged in protected concerted activity or that the Respondent was motivated by reasons other than this prestrike misconduct. We find, therefore, that the Respondent did not violate Sec-

[1] The Respondent has requested oral argument. This request is hereby denied as the hereafter reopened record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] See *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378-380 (1967).

[3] The General Counsel did not show that these eight employees had right of reinstatement apart from the general claim that they were among the alleged unfair labor practice strikers. Therefore, while the Respondent failed to prove at the hearing that which it claimed about these eight employees, it reasonable could have believed that such proof was unnecessary.

tion 8(a)(3) of the Act by, in effect, discharging them for engaging in this unprotected activity.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, IPCO Hospital Supply Corporation, Cheshire Labs Division, Piscataway, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

HERBERT SILBERMAN, Administrative Law Judge: Upon a charge filed on August 31, 1979, by Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called the Union, a complaint was issued on October 15, 1979, alleging that Respondent, IPCO Hospital Supply Corporation, Cheshire Labs Division, herein called the Company or Respondent, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act. In substance, the complaint, as amended at the hearing, alleges that (1) since April 5, 1979, Respondent has failed and refused to furnish the Union with information requested by it which is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of a certified unit of the Company's production and maintenance employees; (2) on and after April 16 Respondent unilaterally, without the agreement of the Union, implemented the wage increases that it had proposed during collective-bargaining negotiations; (3) since April 16 the Company unlawfully denied vacation and holiday pay to employees who engaged in the strike which began on April 16;[1] and (4) during the times material hereto the Company has maintained published rules of conduct which bar solicitation or distribution of literature during working hours without authorization of a supervisor. The complaint further alleges that a strike which began on April 16 was caused and was prolonged by the foregoing unfair labor practices, and that since July 24 Respondent has refused to reinstate striking employees to their former positions of employment although an unconditional offer to return to work was made on their behalf on July 19. Respondent's answer to the complaint denies that it has engaged in the alleged unfair labor practices. A hearing in this proceeding was held in Newark, New Jersey, on March 17, 18, and 19, 1980. Thereafter briefs were filed with the Administrative Law Judge on behalf of the General Counsel and Respondent.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a New York corporation, maintains a plant in Piscataway, New Jersey, where it is engaged in packaging and distributing disposable hospital supplies and related products. In the course of its business operations the Company annually sells products valued in excess of $50,000 which are shipped through channels of interstate commerce from its New Jersey facility to places outside the State of New Jersey. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Negotiations*

The Company, which is a relatively new venture, is engaged in the labor intensive business of packaging medical devices such as urine specimen containers and suture removal kits for hospital use. On January 19, 1978, the Union was certified as the exclusive collective-bargaining representative of the Company's production and maintenance employees. Thereafter, the Union and the Company entered into a collective-bargaining agreement which was effective from April 14, 1978, through April 14, 1979. Negotiations looking towards renewal of the expiring agreement began on March 27 with additional bargaining sessions being held on March 30 and April 3, 5, 9, and 12. Although by the last date the parties were not far apart, nevertheless, agreement was not reached and the Company's employees went on strike beginning Monday, April 16.

At the negotiations the Company was represented by Gerald L. McLaughlin, who was then director of industrial relations but as of the date of the hearing was no longer in the Company's employ, and by Michael Harris, senior staff attorney. McLaughlin acted as chief spokesman for the Company. The Union was represented by Michael J. Merola, who is the manager of the Central and South Jersey Joint Board of the Union, and an employee negotiating committee composed of Virginia Courtney, president of the Local Union, Clara Johnson, Helen Davis, Louise Smith, and Ardene Kelley.

There was a wide difference between the Union's initial wage demand, which asked for an increase of $1 per hour, and the Company's initial offer, which was 5 cents per hour immediately plus 12 cents per hour and 18 cents

[1] In her brief the General Counsel states: "The complaint alleges that Respondent refused to pay vacation benefits in violation of Section 8(a)(1) and (3) of the Act. As the record evidence failed to support this allegation, Counsel for General Counsel would withdraw this allegation." It is clear from reading her brief that a typographical error was made and the General Counsel intended to state that the record evidence fails to support the allegation that the Company unlawfully denied holiday pay to its employees. I find that the evidence adduced at the hearing does not prove such allegation and I shall dismiss that allegation of the complaint.

per hour additionally for the second and third years of a proposed 3-year agreement. On the date the Company presented its initial wage offer and at all subsequent bargaining sessions it maintained that it was in a financial precarious position and was unable to pay its employees more than it was offering.

The complaint alleges:

> Since on or about April 5, 1979, Charging Party, by its agent, Michael Merola, has orally requested Respondent to furnish the Union with the following information: financial data, including profit and loss statements and income tax returns, to support its wage offers and/or proposals.
>
> * * * * *
>
> Since on or about April 5, 1979, Respondent, by Gerald McLaughlin, its personnel manager and agent, has orally failed and refused to furnish the Union the information requested by it as described above . . . .

Michael Merola testified that at the April 3 negotiating session, after the Company had pleaded inability to meet the Union's wage demands, "[W]e told them that we wanted . . . our auditors to come in, and at that time Gerry said, well, I'll have to get back to you . . ." and at the April 5 meeting McLaughlin stated that "they would not give us the right to bring in our auditors." Upon further examination Merola testified that his request was more specific and that at the April 3 meeting he said to McLaughlin, "I felt that I would like to bring in my auditor to look over his financial records and also two years of income tax reports." According to Merola, at the April 9 bargaining session McLaughlin offered to show him alone a profit-and-loss statement which he refused with the explanation that it would place him in an embarrassing position with the negotiating committee if the committee could not also inspect what was shown to him and that he did not have the expertise to understand the statement and he stated that "it would be best if an auditor from the union could come in and look at the documents that [he] had indicated at the previous meeting." Merola further testified that at the April 11 meeting McLaughlin offered to permit Merola and one member of the negotiating committee to inspect the Company's profit-and-loss statement which he rejected stating, "[A]s far as I was concerned it was a waste of time for either of us to come out there. I did not have the expertise to make that kind of a determination and that I would still like an auditor from the international union to come in and examine the documents and two years of income tax reports, and I was told no."

Each of the members of the Union's negotiating committee testified for the General Counsel. In general, while their testimony varied as to details, they corroborated Merola's testimony that the Company refused to permit anyone other than Merola and one member of the negotiating committee to review whatever document the Company was prepared to show them.

On the night of April 11 the Union held a membership meeting at which the progress of the negotiations was discussed. The membership directed the negotiating committee to accept an increase in wage rates of 35 cent per hour and voted that if the Company did not meet such offer to strike. At this meeting one of the members of the negotiating committee asked whether the membership was willing to compromise its demand for a 35-cent-per-hour increase in wages "if the company agreed to let us look at the books and we saw where the company was really doing bad," and the answer of the membership was no, that is, regardless of the Company's financial position the employees were going on strike unless the Company met its minimum demand of a 35-cent-per-hour increase.

The testimony of the Company's witnesses is in substantial conflict with the testimony of the Union's witnesses. According to both Gerald McLaughlin and Michael Harris, at no time during the negotiations did Merola or any member of the Union's negotiating committee request an opportunity to inspect company records in order to verify the Company's claim that it was financially unable to improve the wage offer it had made and on April 11, when the Company's negotiators concluded that the negotiations were not making any headway and that the Union's negotiating committee did not believe the Company's protestations of its inability to pay. After a caucus with other company officials, McLaughlin offered to show a profit-and-loss statement first to Merola and when he demanded that it also be shown to the full committee then to both Merola and the full committee, but the Union merely let the matter die and displayed no interest in inspecting or reviewing company financial records.

Both the General Counsel and Respondent in their respective briefs point to various discrepancies in the testimony of the witnesses for the other side and argue that their witnesses should be credited and their opponent's witnesses discredited and both contend that the circumstances make the testimony of their respective witnesses more plausible. I find that there are no objective circumstances which tend to support the veracity of either the General Counsel's witnesses or Respondent's witnesses. I do not consider the various inconsistencies in testimony and other factors suggested in the respective briefs of counsel as compelling arguments. In this case, there is nothing more substantial to direct me towards resolving the conflict in testimony than my opinion of the veracity of the respective witnesses. After having viewed and listened to the witnesses and after having read the transcript of their testimony I am of the opinion that the testimony given by Respondent's witnesses Gerald McLaughlin and Michael Harris is more reliable than the testimony given by the General Counsel's witnesses Michael Merola and the five members of the Union's negotiating committee. Accordingly, I find that the General Counsel has not proved by a preponderance of the evidence that the Union in April 1979, during its negotiations with the Company, made a request upon the Company to furnish it with financial information and that the Company denied such request. Therefore, I shall recommend that the allegations of the complaint relating to the Company's unlawful refusal to furnish the Union with

relevant and necessary financial information be dismissed.

B. *The Unilateral Wage Increases*

At the hearing the parties entered into the following stipulation:

> On April 16, 1979, the Employer instituted a wage increase of 13 cents. That increase was applied to all employees who did not strike, to returning strikers and to all new hires. On October 14, 1979, the Employer increased wage rates by 18 cents. That increase was applied to all employees who did not strike, to returning strikers and to all new hires.

The General Counsel and Respondent further stipulated:

> If it is found that Respondent has not unlawfully failed to supply financial information to the union, as alleged in paragraphs 13 to 15 of the complaint, then as of April 16, 1979, there was a bona fide impasse in the negotiations.
>
> If, however, it is found that Respondent did unlawfully fail to supply financial information to the union as alleged in paragraphs 13 to 15 of the complaint, then, as of April 16, 1979, there was no bona fide impasse.

As I have found that Respondent has not unlawfully failed to supply financial information to the Union, in accordance with the stipulation of the parties, I find that as of April 16 the parties were at a bona fide impasse and therefore the wage increases which the Company implemented on April 16 and October 4 were not unlawful. I shall, therefore, recommend that the allegations of the complaint relating thereto be dismissed.

C. *Vacation Pay*

The complaint alleges that "[s]ince on or about April 16, 1979, and continuously thereafter, Respondent denied vacation . . . pay to employees who engaged in the strike . . . ." The evidence is that all strikers entitled to vacation pay ultimately were given their vacation pay. The General Counsel argues however that "[i]t is undisputed that on various occasions in May, June and July, 1979 at least seven employees were informed by Respondent's supervisors Joe Perricone and Janis Rocco that they could obtain vacation pay only if they quit or returned to work."

Any entitlement the striking employees had to vacation pay derives from the parties' collective-bargaining agreement. The pertinent provisions are:

> Employees shall notify the Employer during the first week in January of each year as to the time he wishes to take his vacation . . . .
>
> Employees may not accumulate vacations from one year to the next and vacations shall be taken within the twelve (12) month period following June 30.
>
> Employees leaving the employ of the Employer, for any reason, shall receive prorated and accrued vacation pay. Prorated and accrued vacation pay will be paid to the estate of deceased employees.

According to McLaughlin, the Company interprets the vacation pay provisions of the contract to mean that "vacation time is to be taken after June 30th, that vacation pay is only paid upon termination in lieu of vacation. Otherwise . . . vacation pay is made when vacation time is taken, after June 30th." The General Counsel did not introduce any evidence which in any way refuted the Company's interpretation of the agreement. Further, I find that the General Counsel has not proved that any striking employee was entitled to vacation pay at the time such employee inquired whether she could receive her vacation pay. Thus, the General Counsel has not proved the allegation of the complaint that "Respondent denied vacation . . . pay to employees who engaged in the strike." Accordingly, I shall recommend that this allegation of the complaint be dismissed.

D. *The No-Solicitation Rule*

During the times material hereto the Company has published "Rules of Conduct" for its employees which includes the following rule that the General Counsel argues is unlawfully restrictive because it provides penalties for

> Solicitation or distribution of literature during working hours for any purpose without written authorization of the supervisor.

Respondent does not dispute that the rule as framed is unlawfully restrictive but argues, first, that it has never been enforced and, second, that after it was drafted it was submitted to the Union's negotiating team for review and they had no objection.

As the rule has never been revoked there remains the potential that it might be enforced, thus it would tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. I find, therefore, that by publishing the above-quoted rule Respondent has violated Section 8(a)(1) of the Act.

E. *The Strike*

The complaint alleges that the strike which began on April 16 was caused or was prolonged by Respondent's unfair labor practices described in the complaint. However, I find that the only unfair labor practice on the part of Respondent proved in this proceeding was the promulgation of an unlawfully restrictive no-solicitation and no-distribution rule. There is no evidence that the existence of this rule in any manner contributed to the employees' decision to go on strike or prolonged the strike. Accordingly, I find that the General Counsel has not proved that the strike which began on April 16 was an unfair labor practice strike.

By letter dated July 19 the Union submitted the following request for the reinstatement of the striking employees:

> Be advised that the strike of your employees and A.C.T.W.U. is terminated as of July 18, 1979.
>
> The Union, on behalf of, and with the authority from, each and every striking employee, does hereby offer to return to work immediately and unconditionally. A list of the striking employees is enclosed.
>
> Be further advised that the A.C.T.W.U. position is that your unlawful activities and unfair labor practices prolonged the strike and that the striking employees are unfair labor practice strikers and, therefore, are entitled to reinstatement regardless of replacements.
>
> Despite this statement of position, each and every striking employee does hereby make an unconditional offer to return to work immediately, or as soon as employment becomes available, whichever be appropriate according to law.
>
> This letter is meant to be an unconditional offer to return to work, and is in no way a waiver of any of the Union's or the employee's legal rights.

The Company responded by letter dated July 24, 1979, as follows:

> I am in receipt of your letter of July 19, 1979. Please be advised that Cheshire Laboratories denies the A.C.T.W.U.'s allegation regarding the commission by us of unlawful activities and unlawful labor practices. Cheshire, therefore, intends to abide by the law and to meet with the representatives of the National Labor Relations Board with regard to your charges.

On September 6 the Company sent telegrams to 35 striking employees offering them reinstatement. However, 17 of the 52 employees who initially went on strike have not been offered reinstatmment. Respondent's position in regard to those 17 employees, as expressed by its counsel at the hearing, is that 5 returned to work voluntarily, 3 voluntarily resigned their positions, and 9 employees had engaged in various acts of misconduct.

The General Counsel argues that "[t]he evidence that Respondent's employees engaged in an unfair labor practice strike, that the Union made an unconditional application for reinstatement on their behalf, and that Respondent has refused to re-employ certain employees pursuant thereto, establishes, *prima facie*, that Respondent has violated Section 8(a)(1) and (3) of the Act." However, contrary to the General Counsel, I have found that the strike is not an unfair labor practice strike. Further, in order to establish that a company unlawfully has refused reinstatement to employees engaged in an economic strike it must be established not only that such employees made unconditional applications to return to work but also that positions had become available for each such striking employee either because the job the employee left had not been filled during the strike or because the replacement who had been hired to fill the job ceased to work for the company. This has not been established. The General Counsel offered no evidence that since July 19, 1979, there were any job vacancies which Respondent was under a duty to offer to the striking employees. Thus, the General Counsel has not proved any violation of the Act in respect to the eight unnamed employees whom Respondent contends either voluntarily returned to work or resigned.

The case with respect to the other nine employees is different. Respondent's position is that even if positions become available it would not reinstate them. Accordingly, unless its position is justified Respondent's refusal to consider these nine employees eligible for reinstatement constitutes unlawful discrimination. These employees fall into three categories: One employee was refused reinstatement because she allegedly engaged in an act of picket line violence; three employees were refused reinstatement because allegedly they threw nails on a driveway; and five employees were refused reinstatement because allegedly they refused to leave the Company's premises when requested to do so and when they had no lawful right to remain on the premises.

1. Ardene Kelley

Respondent contends that Kelley disqualified herself from reinstatement because while acting as a picket she slapped another employee who was seeking to cross the picket line. Employee Ellen O'Hara testified that one morning in June as she was driving into the plant the pickets forced her to stop. Ardene Kelley opened the door of her car, slapped her across the face and neck, and said, "I don't want to go to jail today, Honey, but I'm going to get you."

Kelley admits that she slapped O'Hara. Her story is that several days earlier she was standing on the picket line in the rain with an umbrella in her hand when "[a]ll at once this car came out of nowhere and came into me, and I came down with my umbrella. The umbrella was broke . . . ." Then, according to Kelley's further testimony, on the day in question when she observed O'Hara's car in the driveway, "I walked over to the car, the door was open, and I went up to her and I said, 'Why did you hit me with your car the other day?' She said, 'What?' I said, 'You hit me with your car the other day.' She said, 'Tough shit'. . . . I smacked her . . . . I said, 'you're going to hit me with your car and that's all you have to say?' By that time she was blowing her horn, the cops and Carmen came over to the car and I left."

I find that Ardene Kelley was an untruthful witness. Based on the evidence in the record which I credit I find that on the first occasion referred to by Kelley she was not hit by O'Hara's car and, contrary to her testimony, on that occasion she and other people seeking to frighten O'Hara struck O'Hara's car with umbrellas. I find, in accordance with O'Hara's testimony, which I credit, that on the day in question Kelley without any provocation opened the door of O'Hara's car, struck her, and threatened her with the remark quoted above. I further find that it is not unlawful for Respondent to refuse to reinstate Ardene Kelley.

2. Margaret Decker, Deborah Silvio, and Rita VanDunk

I credit the testimony of Respondent's witnesses Carmen Geannandrea and Jack Fix regarding these employees. In early June 1979 Margaret Decker, Deborah Silvio, and Rita VanDunk appeared at a ball field where the Company's softball team was playing carrying picket signs. They sat in the stands of the opposing team and from time to time called obscene profanities at members of the Company's team. The three were asked to leave. They departed in the automobile in which they came and as they were driving away they threw nails along the road.[2] Respondent argues:

> Such conduct engaged in at the plant premises would be serious enough. It is even *more* serious here where the three strikers purposely went looking for trouble in a completely neutral setting far from the "battle ground" surrounding the Company's premises. In other words, the scene was not at the plant where the strikers worked; it was not during a regular work day; it was not a situation where nonstrikers were trying to cross a picket line and one word led to another; it was a totally non-work related recreational function, six miles away from the plant, outside of work hours, participated in and attended by many people who had no connection whatsoever with the employer!
>
> We submit that the conduct engaged in by way of profanity and a threat to kill plus *the physical act of throwing nails* with the clear purpose of destruction of property of completely uninvolved people justifies the Employer's decision not to reinstate Decker, Silvio, and VanDunk.

I agree with Respondent's argument. The Board has held that "nail throwing on the picket line is conduct sufficiently serious to warrant discharge.[3] Employees who engage in similar conduct away from the picket line but in pursuit of the purposes of the strike, as Decker, Silvio, and VanDunk were doing by appearing at the ball game with picket signs, likewise places the employees' conduct outside the protection of the Act. I find, therefore, that Respondent has not violated the Act by refusing to consider these three employees eligible for reinstatement.

3. Virginia Courtney, Helen Parlapiano, Carole Suk, Deborah Tronicke, and Connie Talbot

On April 12 the Company's production and maintenance employees engaged in a slowdown. Although at the request of the management representatives made during the negotiating sessions Michael Merola cautioned the employees against engaging in any slowdown, the next day the slowdown continued with one production line doing no work at all.[4] Company General Manager Carmen Geannandrea instructed his supervisors to tell those employees that if they were not going to work to punch out and leave the premises. The nine employees on that line punched out but five, Courtney, Parlapiano, Suk, Tronicke, and Talbot, went to the lunchroom. I credit the testimony of Carmen Geannandrea that he was called to the lunchroom where he observed the five women sitting at a table. Geannandrea testified, "I asked them to leave and they all gave me some kind of lip. I can't recall. And Virginia (Courtney) said the only way you're going to get us out of here is you have to bodily remove me from here . . . I asked her to leave again and she gave me the same reply so then I went and I called the police." The police arrived in 10 or 15 minutes and it took the policemen another 10 to 20 minutes to coax the five women to leave the premises.

No reason was given by any witness for the General Counsel as to why the five women assembled and remained in the cafeteria after they were requested to leave, other than Virginia Courtney testified that after she punched out and was being escorted by Janis Rocco out of the plant "I told [Rocco] I want to call the union and tell them what's going on . . . I tried—kept trying to call them."

As Courtney and the four other ladies had no legitimate reason for refusing to leave the plant after having been requested to do so they were not engaged in any protected activity while they remained in the cafeteria. Accordingly, the Company was privileged to discipline them for such conduct.[5] Therefore, I find that Respondent did not violate the Act by refusing to reinstate these five employees.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. By promulgating a rule which unlawfully restricts employees from engaging in union activities on Respondent's premises during working hours, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them under Section

[2] I do not credit the denials of Decker, Silvio, and VanDunk.

[3] *Moore Business Forms, Inc.*, 224 NLRB 393, 404 (1976). Accord: *Jai Lai Cafe, Inc.*, 200 NLRB 1167, 1174 (1973).

[4] The collective-bargaining agreement contained a no-strike, no-slowdown provision.

[5] The General Counsel did not adduce evidence to establish that any of the five women were discharged because of their union activities or that the alleged cafeteria incident was merely a pretext advanced by Respondent to disguise its otherwise unlawful motive.

7 and thereby has engaged in unfair labor practices within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

2. Except as specifically found herein, Respondent has not otherwise engaged in the violations of the Act alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, IPCO Hospital Supply Corporation, Cheshire Labs Division, Piscataway, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating or maintaining in effect any rule which prohibits solicitation or distribution of literature during working hours for any purpose without written authorization of the supervisor or which otherwise unlawfully restricts its employees' right to engage in union activities in the Company's premises.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Post at its place of business in Piscataway, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that, except for the violation herein specifically found, the allegations of the complaint alleging violations of the National Labor Relations Act be dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT promulgate or maintain any rule which prohibits solicitation or distribution of literature during working hours for any purpose without written authorization of the supervisor or which otherwise unlawfully restricts our employees' right to engage in union activities on the Company's premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

IPCO HOSPITAL SUPPLY CORPORATION,
CHESHIRE LABS DIVISION

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."